


1-1-2002

Ethics for Skeptics

W. Bradley Wendel

Cornell Law School, bradley-wendel@lawschool.cornell.edu

Follow this and additional works at: <http://scholarship.law.cornell.edu/facpub>

 Part of the [Educational Methods Commons](#), [Ethics and Professional Responsibility Commons](#), and the [Legal Education Commons](#)

Recommended Citation

Wendel, W. Bradley, "Ethics for Skeptics" (2002). *Cornell Law Faculty Publications*. Paper 491.
<http://scholarship.law.cornell.edu/facpub/491>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Publications by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

ETHICS FOR SKEPTICS

*W. Bradley Wendel**

I. INTRODUCTION

One of the themes of the 2002 annual meeting of the Association of American Law Schools (“AALS”) has been that we, as teachers, must do better at engaging our students “where they’re at.” A number of speakers on various panels addressed the consumerist mentality among students, the desire of a population raised on MTV for multimedia lectures that resemble rapidly paced entertainment with high production values, and the suspicion of students toward claims of authority by teachers that are not backed up by respect and hard work. In addition, I would add a further observation as a teacher of ethics to both undergraduate and law students—students are profoundly skeptical of the capacity of moral reasoning to deliver conclusions that are mandatory for them. This position takes various forms in the classroom. The first, and the silliest, is subjectivism. Students occasionally claim that ethical reasoning is relative to individual belief systems. Thus, if a person does not think something is wrong, it is not. A more plausible version of this claim is that ethical truth is relative to the existing norms and practices of a community—perhaps a culture, a linguistic group, a tradition, an ethnicity, a nation, or a historical period. The final claim is one of skepticism—that there are no objective values or, at least, if there are, they are nevertheless not objectively knowable. Skeptical arguments are often linked with suggestions that ethics should be shunted off to another domain more appropriate for matters of preference or opinion. Students often express this ar-

* Assistant Professor of Law, Washington and Lee University. This essay is based on the remarks I presented at the meeting of the Professional Responsibility Section at the 2002 AALS Annual Meeting in New Orleans, Louisiana. I am grateful to Steven Hobbs for his invitation to appear on the panel and to Bob Cochran for suggesting me as a speaker. This is intended to be a non-technical overview of a method of doing and teaching ethics. A more detailed version of the argument can be found in an article entitled *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, in a symposium in *The University of San Francisco Law Review* on teaching values in law school. W. Bradley Wendel, *Teaching Ethics in an Atmosphere of Skepticism and Relativism*, 36 U.S.F.L. REV. 711 (2002).

gument by saying that one should not "impose one's views" on others, assuming as if people who make moral arguments are somehow coercing audiences into accepting their arguments.

These attitudes are not threatening to a teacher of professional responsibility who is content to teach legal doctrine. I wish to make clear that I am in no way disparaging the teaching of the law governing lawyers, which is a complex and fascinating subject. In light of the richness of the law of lawyering—which goes well beyond the Model Rules¹ into agency, evidence, procedural, tort, constitutional, and criminal law²—a reasonable teacher could be justified in confining a professional responsibility course to the law and related policy arguments, like many other law school subjects. However, if a teacher feels the pull of "real ethics" or "ethics beyond the rules" in a professional responsibility course,³ then he or she will probably encounter the attitudes of skepticism and relativism.

The attitude is rooted in a number of intellectual currents running through the culture of higher education and of society as a whole. In this essay, I wish to take account of one possible source of the students' attitudes of skepticism and relativism. Students (and perhaps teachers) may be setting the bar too high for ethics, demanding that it deliver objective knowledge in the same manner as the natural sciences. This expectation rests on a misunderstanding about how ethical reasoning works, but to be fair to our students, it also has deep roots in moral philosophy, particularly in the Kantian tradition of seeking necessary foundations for ethics.⁴ The task for ethics is to locate a method of reasoning that is "objective enough," without becoming paralyzed with the false ambition of delivering objective truths on the model of the empirical sciences. For example, I would venture that everyone believes the following statements are true:

1. MODEL RULES OF PROF'L CONDUCT (1983).

2. The work of Geoffrey Hazard, Roger Cramton, and Susan Koniak has consistently emphasized the importance of other sources of law. See, e.g., GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* (3d ed. 1999); Susan Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992); Geoffrey Hazard, *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701 (1993). The new Restatement of the Law Governing Lawyers appropriately draws from these various bodies of law.

3. I will make a plea that teachers stop referring to the subject comprising the law governing lawyers, or the disciplinary rules promulgated by the American Bar Association (in model form) or state bar associations, as "legal ethics." For one thing, it requires bizarre locution like "real ethics" to describe what everyone else would simply call ethics. More substantively, I fear that by using the label "legal ethics" to describe the rules and other law, we lull students into believing that their only ethical obligation as a lawyer is to comply with legal norms. There is much more to the moral life than following rules, and we as teachers of ethics would be doing a disservice to our students if we did not emphasize this distinction and underscore it by the names we give to these subjects.

4. See, e.g., Stephen Darwall, et al., *Toward fin de siècle Ethics: Some Trends*, 101 PHIL. REV. 115, 126 (1992).

Atoms are made up of protons, neutrons, and electrons.

Genocide is evil.

In fact, I am probably more confident in the truth of the second statement, having no direct personal experience with the subatomic structure of matter. (I have no reason to *doubt* the first statement, but I do have something of a feeling of taking it on faith from scientists; whereas, I can verify the second statement more directly.) Despite our confidence in the truth of these statements, we must verify and justify them in very different ways. The statement about atoms can be verified by the empirical methods and interpretive standards ordinarily used by scientists. The statement about genocide depends for its verification on something quite different, but its methods are familiar, too. Indeed, its methods are more familiar, since they do not involve cloud-chambers, particle accelerators, or complicated mathematics. Rather, ethics is part of everyday life, even if we do not always recognize it as such.

This essay briefly sketches a methodology for thinking about and teaching ethics to law students. It is not intended to be a technical defense of any particular metaethical position, and indeed it is aimed at non-specialist law teachers. Part of the reluctance to teach ethics beyond the rules may stem from a fear that starting down that path will lead a teacher into a morass of names and jargon with which he or she is not familiar. Although doing interdisciplinary scholarship in professional ethics does require some familiarity with the moral and political philosophy literature, competent teaching of professional ethics does not.

II. TEACHING ETHICS TO PROFESSED SKEPTICS

A. Begin with a Foundation of Everyday Experience

There are two ways to approach legal ethics, or any ethics for that matter. The two methods can be referred to as top-down and bottom-up. The top-down approach is familiar to anyone who has taken an introductory course in moral philosophy. It begins with a theory, stated at a high level of abstraction⁵—an action that is right that maximizes the aggregate amount of good in the world and minimizes the overall level of bad; act so that the maxim of your action can be willed to be a universal law; and so on. The task for ethics is to justify this theory, do whatever internal tinkering is necessary to respond to objections, and work out the application of the theory in specific cases. For example, we might ask how util-

5. J.B. Schneewind, *Moral Knowledge and Moral Principles*, in REVISIONS: CHANGING PERSPECTIVES IN MORAL PHILOSOPHY 113 (Alasdair MacIntyre & Stanley Hauerwas eds., 1983).

ity can be compared between persons, or quibble with the way the maxim of an action is formulated in a particular instance. But, the logical structure of this method remains the same—a conclusion (“do such-and-such”) that follows deductively from premises including a general theoretical principle and the description of a set of facts.

The bottom-up method is less familiar in academic ethics, but it is far more common in everyday moral life. It begins with evaluative responses (often called “intuitions”⁶) to particular cases. It is not hard to generate some of these intuitions with examples from private and public life. Any ethics teacher can make up examples; the goal is simply to keep the cases mundane and involved with matters about which students are likely to have strong reactions.

a. If you can cheat on an exam without being observed (and you are sure you will get away with it), should you do it?

b. An example I have borrowed from a friend of mine, who taught innumerable introductory ethics courses as a graduate student in philosophy: If students claim that ethics is purely subjective, or is merely the interests of the stronger, why not propose the following grading system: People with an even number of letters in their last names receive a “A,” and those with an odd number of letters receive a “D.”

c. An extended example, which I recently observed: In a certain church in Italy, there are wonderful allegorical frescoes painted in the fourteenth century. The church has put out interpretive guides to the frescoes, in various languages, and has left racks of these guides out near the back of the church. You are instructed to drop a 10,000 lira note (about \$5) as a “voluntary donation” into a box when picking up your guide. You know from visiting many such churches that it is not illegal to take a guide without paying, but paying is expected. Churches structure the transaction in this form to keep their costs down—they don’t have to hire a cashier and file onerous reports of sales to the taxation authorities. It is the middle of the afternoon, and the church is practically vacant. The few other people inside are looking at the frescoes at the other end of the building. You can easily pick up a guide without putting money in the slot, absolutely certain that you will not be observed.

6. Not to be confused with the metaethical position known as “intuitionism,” which posits that values are known through a faculty called intuition, which delivers objective truths about ethics. Rawls calls these responses “considered moral judgments” to emphasize that they are not spontaneous reactions but are rather reasonably thought-out normative responses, free of the distorting effects of prejudice or passion, about which we can be fairly confident. See JOHN RAWLS, *A THEORY OF JUSTICE* 47-48 (1971).

d(i). Should President Clinton have resigned after admitting his affair with Monica Lewinsky?

d(ii). Assuming for the sake of argument that Clinton did not commit perjury in the Paula Jones deposition, because of the unusual definition of "sexual relations," did he nevertheless do something morally wrong when he announced to a television audience (underscoring his denial with the notorious finger-waggle) that he did not have sex with Lewinsky?

d(iii). Should Republicans in Congress have backed off and left Clinton alone, on the grounds that the affair was a private matter?

d(iv). Were the extramarital affairs of Republican congressional leaders fair game for public investigation during the controversy over Clinton's behavior?

e(i). Is there anything wrong with closing a factory in the United States at which unionized workers had received fair wages and benefits, and opening a factory in Matamoros, Mexico, at which workers earn a fraction of what employees in the United States had received?

e(ii). If it is not wrong to shutter factories and move manufacturing operations to Mexico when the result would be increased shareholder profit, why does everyone think that Aaron Feurstein, the CEO of Malden Mills, is a hero?

f(i). Was it wrong for the Taliban to force Afghan women to wear burkhas in public?

f(ii). Was it legitimate for observers, predominantly in the West, to object to the destruction by the Taliban of ancient statues of the Buddha in Afghanistan?

f(iii). Is it wrong for the United States to bomb suspected al-Qaeda and Taliban strongholds when civilian casualties are highly likely to result?

g. A more mundane, but nevertheless ethically significant example: There was recently a great deal of press coverage of a Little League baseball coach who had enjoyed stunning success. As it turns out, he succeeded through bending the rules of the organization—for example, by using an over-age pitcher. Assume that Little League officials have historically been fairly lax about these sorts of violations. Is there anything wrong with the coach's conduct?

These questions, or similar ones, should result in student responses at the first order of ethical evaluation—that is, normative claims that something should or should not be done, or that a person or institution is good or bad for acting in a particular way. For example, in response to the grading proposal in example b, students invariably protest, “That wouldn’t be fair!” Fairness is an ethical concept, and one which assumes that one can state and defend ethical principles that are not purely subjective. These initial responses need not be very articulate. Even a reaction like “What kind of sleazebag would cheat at *Little League*?” can get the discussion moving. The point is to get people to commit to first-order ethical evaluations, before beginning the much more complicated process of justifying them. It is this part of the evaluative process that goes on all the time, even if it is not dignified by a label like “ethics.” Nothing is more mundane and familiar than our daily action of participating in practices of choosing, judging, praising, and blaming, in deciding whether someone is a decent person or a “jerk,” and forming opinions about acquaintances and public figures.

It is important to underscore the “ordinariness” of experience that this method draws upon. When academic moral philosophers opt for the bottom-up approach, the results can sometimes be unintentionally comical. In fact, many of the examples deployed by philosophers verge on self-parody: “X and Y are adrift in a lifeboat. Y has a disease which he can survive, but which will kill X if he contracts it.”⁷ Can X push Y over the side? The problem with an example like this is not only that it is wildly unrealistic (how on earth does X know he will die, but that Y will survive the disease?), but that we have no settled moral intuitions from which we can draw in evaluating the case. Most of us have never even been in a lifeboat, let alone been in a trolley plunging down a precipitous slope or in the position of sharing our kidneys with Jascha Heifetz. Asking for our evaluative response to one of these fanciful cases is like demanding to know how we would perform under fire in combat. No matter how many times I watch the D-Day sequence in *Saving Private Ryan*,⁸ I truly cannot imagine what it would have been like to come ashore on Omaha Beach, and I certainly have no idea whether I would have cow-

7. This example was selected literally at random, and is not intended to reflect badly on its source, namely Baruch Brody, *Thomson on Abortion*, 1 PHIL. & PUB. AFF. 335, 337 (1972). The “Thomson” referred to in the title is moral philosopher Judith Jarvis Thomson, who has created some of the most bizarrely imaginative and frequently discussed dilemmas in ethics literature. Her examples include a person who wakes up one morning to find that her kidneys have been attached to a famous violinist who will die if surgically detached, and a trolley which is hurtling downhill toward an intersection, at which the driver may do nothing and crash into a school bus full of children, or switch the trolley off onto a different track resulting in the death of one person. See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971) (famous violinist); Judith Jarvis Thomson, *The Trolley Problem*, in RIGHTS, RESTITUTION & RISK: ESSAYS ON MORAL THEORY 94 (1986).

8. SAVING PRIVATE RYAN (Paramount Pictures 1998).

ered uselessly behind an obstacle or organized an effective attack on the German defenses, like Tom Hanks.

Another problem with lifeboat-style examples is that they unintentionally push readers toward subjectivist or existentialist approaches to ethics. It is so difficult to imagine what a reasonable person would do in a situation of extreme moral peril that one is tempted to approve of just about any response that seems to reflect agonized thought. (This has always been my reaction to Bernard Williams's famous "Jim and the Indians" dilemma.⁹) These thought experiments seek to define the heartland of ethics as a domain of heroism and tragedy and stark choices between catastrophic outcomes. However, in doing so they obscure the extent to which ethics is a perfectly ordinary response to mundane affairs. A complete system of ethics does, at some point, need to address life-and-death dilemmas, and there are subdisciplines such as biomedical ethics which, by their very nature, confront these problems more frequently. However, much of legal ethics deals with more pedestrian concerns, such as greed, deception, promise-keeping, cheating, bullying, and harassment. (Of course there are a few cases, like *Spaulding v. Zimmerman*,¹⁰ which do present choices involving life and death.) There is no reason for an ethics class to get stuck in the bramble bush of overly dramatic moral dilemmas.

*B. Ask "In Virtue of What" Do We Reason to These
Practical Conclusions*

Once people have offered an evaluation of an action or a person's character, the next step is to inquire into the basis for this judgment. The grounds of ethical judgments can be diverse, and may even conflict in particular cases. Nevertheless, we would expect patterns of argument to emerge along lines such as these:

- The purpose for which some activity is conducted can be the basis for evaluation. In the Little League case one would generally assume that its educational functions—teaching kids how to work hard, play as a team, get along with others, and in particular to play fairly—is more important than winning. The grade hypothetical strikes students as unfair be-

9. Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 75, 98 (1973). The case invites you to imagine the case of Jim, a journalist who happens upon a group of twenty natives, who have been taken hostage by troops fighting against a rebellion in a Latin American country. As a courtesy to Jim (why would this be a courtesy?) the leader of the rebels offers to free nineteen of the hostages if Jim shoots one. If Jim refuses, the rebels will shoot them all. There is something of a cottage industry of Jim and the Indians analysis in contemporary moral philosophy.

10. 116 N.W. 2d 704 (Minn. 1962).

cause of their sense (a quite reasonable one) that grades ought to be allocated on the basis of merit, where merit is understood as having a connection with standards internal to the discipline they are studying.

- We respect certain kinds of institutions because we realize they are either beneficial to us or they produce some kind of human good, the production of which would be undermined by cheating, “defecting” from the cooperative solution, or free-riding. Taking something without paying for it (the church pamphlets example) erodes the effectiveness of an institution and its practices that are highly beneficial. This is not just an argument from enlightened self-interest, since the benefit of these institutions may go to someone other than the actor; nevertheless, we recognize the importance of the goods that are made possible by these practices and act to support them.
- Ethical judgments must be consistent across a range of relevantly similar cases. The point of examples e(i) and e(ii) is that one cannot regard the process of moving factories to Mexico as praiseworthy, or morally neutral, while at the same time heaping lavish praise on the CEO of a company that continued to keep workers on the payroll after its principal manufacturing plant burned down.
- Ethics is a domain of reasoning that is independent of one's self-interest. Thus, the fact that a shareholder of a corporation would be benefited economically from closing a plant and moving it to Mexico is not a sufficient ethical justification for taking that action.
- Certain traits are ruled out as reasons for treating people differently. That, at least, is generally the reason that students give for criticizing the Taliban's treatment of women in Afghanistan.
- The voluntary actions of people can create rights and obligations, as well as changing the ethical duties of those who interact with them. In classical “just war” theory, civilians and combatants are treated differently, in part because of the assumption that combatants have chosen to engage in armed combat. (Conscripts pose a kind of intermediate case.)

- Ethics is generally concerned with promoting human goods and avoiding human bads. All things being equal, an action that avoided gratuitous human suffering (a clear human bad) should be preferred. Human goods can be subtle and diverse. For example, one argument against the Taliban's destruction of the Buddha statues would be that the artifacts of an ancient civilization are intrinsically valuable and should be preserved. The opposing argument is, of course, that religion is essential to human flourishing, and others should be reluctant to interfere with others' religiously motivated actions.

Obviously there are many more reasons like these which can be offered in connection with the examples given. Here, the point is to suggest *styles* of ethical reasoning, not to provide an exhaustive list of the sorts of reasons that can be deployed in these arguments. This can be seen as a *procedural* approach to ethics, in which the content of substantive ethical norms (for example, "employees are entitled to a fair wage and safe working conditions") is less important than the nature of the reasons that are given for and against such a position. Naturally, there is overlap between substance and procedure. For instance, the argument against sex discrimination relies on a procedural or "jurisdictional point" (ethics should be impartial as between men and women), but also depends on a substantive position (sex is a characteristic upon which ethical distinctions should not be based) which is certainly contestable.¹¹

Even if these ethical principles remain contestable, and even if the ethical principles deployed in arguments conflict with one another, they provide a crucial link between first-order evaluative responses to particular cases and ethical reasoning at a higher level of abstraction. The arguments attempt to justify first-order responses in terms of these higher-order principles. The dialectic between reactions to particular cases and theoretical principles—what Rawls would call the process of "reflective equilibrium"¹²—can be sharpened by comparing relevantly similar cases.

C. Reason by Analogy to Disputed Cases

Non-relative arguments about justice proceed by showing similarities with settled cases, in which people agree about the moral evaluation of another's conduct or attitudes; the arguments by analogy depend on the

11. Consider the varieties of feminism and their approach to differences between the sexes. Professor Carol Gilligan of Harvard and others celebrate it, while some feminists castigate Gilligan for essentializing women as nurturers.

12. See JOHN RAWLS, A THEORY OF JUSTICE 48-51 (1971).

generality of the ethical principles that underlie the evaluation of a settled case, and the applicability of those principles to a new case.¹³ An argument would look something like this: "Will you not see that women, no less than men, are capable of useful work and of thought, of discovery and of creation, and that it is unjust that they should not have equal opportunities?"¹⁴ Like our first-order evaluative responses to particular cases, reasoning by analogy in this way is part of our everyday life. Arguments in the popular press or appeals to the public by politicians depend on analogies. Consider, for instance, the frequently drawn comparisons between the threat to the rule of law posed by Clinton's perjury and Nixon's role in the Watergate cover-up.¹⁵ Not only popular ethical arguments can proceed through this analogical reasoning. Rather, careful analysis in professional ethics also makes use of the concept of relevant similarities between cases.

In case-by-case reasoning, or casuistry, an ethical judgment depends both on the facts of the particular case and higher-order ethical principles. Those who are proficient at this type of reasoning are sensitive to the way in which small variations in the facts can make a significant difference to the ultimate judgment. For example, imagine a clear case of unjustified murder. One's first-order evaluative response is that this act is unethical, and this initial response is justified by an argument based on the intrinsic value of human life and the immorality of causing needless suffering.¹⁶ There are, of course, endless variations on this case. What if the killing was in self-defense? What if the killer was in the heat of passion? What if the victim was a soldier fighting for a brutal occupying regime? What if the killing was denominated an "execution" after trial? If this reasoning process sounds familiar, it is because it works exactly like the common law. Precedent cases do not have the same kind of authority in ethical casuistry—there is no doctrine comparable to *stare decisis*—but settled cases do serve to summarize complex ethical arguments. For instance, we are better able to understand and respond in ethical terms to the Taliban's treatment of women by virtue of having endured wrenching arguments in this country over racial segregation. Surely the prohibition on women in the workplace in Afghanistan is

13. See generally HUGO ADAM BEDAU, MAKING MORTAL CHOICES: THREE EXERCISES IN MORAL CASUISTRY (1997); RICHARD B. MILLER, CASUISTRY AND MODERN ETHICS: A POETICS OF PRACTICAL REASONING (1996); ALBERT R. JONSEN & STEPHEN TOULMIN, THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING (1988).

14. STUART HAMPSHIRE, INNOCENCE AND EXPERIENCE 63 (1989).

15. See, e.g., THE IMPEACHMENT OF AND TRIAL OF PRESIDENT CLINTON 419-22 (Merrill McLoughlin ed., 1999) (closing argument of Charles Canady). The analogies get a bit strained. Henry Hyde, for example, cited Gibbon's description of the character of Septimius Severus, presumably to suggest that the United States is in for a decline and fall if Clinton is permitted to remain in office. See *id.*, at 432 (closing argument of Henry Hyde).

16. This account of casuist reasoning is drawn from JONSEN & TOULMIN, *supra* note 13, at 149-51, 251-57.

similar in relevant respects to the regime of Jim Crow. In addition, the case-by-case reasoning process generates additional rational criteria that constrain ethical arguments by focusing on *relevant* similarities between cases. Thus, by starting with first-order normative appraisals, pushing the justification process back through reasons supporting these evaluative responses, and then by seeking analogies and disanalogies with cases in which our ethical judgments are clear, we can do a pretty fair job of establishing an intersubjectively valid procedure for reasoning about ethics.

The objection that naturally arises here is that agreement on process does not guarantee agreement on results. We may share a working conceptual “toolkit” of ethical principles and styles of argument, but nevertheless be trapped in a situation of interminable disagreement over the most important, and hotly contested ethical issues, such as the morality of abortion. That does not strike me as a reason to doubt the efficacy of ethical reasoning. For one thing, these areas of disagreement are probably fewer than generally believed; some sociological research indicates broad agreement, at least within American society, on a number of difficult moral questions.¹⁷ Furthermore, ethical reasoning may have accomplished something even if it has not terminated the dispute. For example, it very well may be the case that we have managed to get clear on the focal point of disagreement, or isolate out some empirical issues that must be resolved in order to get more purchase on the remaining normative questions. Beyond the quibbles with the efficacy of ethics, some students may express doubt that ethical reasons offered by others can be reasons “for them.” This is the challenge of radical skepticism or subjectivism, and I think the only appropriate response is not to take it seriously, as the concluding section argues.

D. Seek Serenity

Students, and a great many ethicists, tend to think that moral philosophy is worthless unless it issues in conclusions that are absolute, necessary, valid at all times and in all places, and impossible for anyone to reject. “These would be knock-down arguments, capable of appealing to all reasonable people simply in virtue of their rationality, and independent of any particular desire or interest that they happen to have.”¹⁸ Anything less than this kind of Kantian perfection seems to risk tumbling down a slippery slope into relativism and subjectivism. Unfortunately, by

17. See ALAN WOLFE, ONE NATION, AFTER ALL: WHAT MIDDLE-CLASS AMERICANS REALLY THINK ABOUT GOD, COUNTRY, FAMILY, RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT, AND EACH OTHER (1998).

18. SIMON BLACKBURN, RULING PASSIONS 253 (1998).

setting an unattainable standard for success, ethics opens itself up to unjustified criticism for failing to deliver. It may never be possible to come up with Reasons (with a capital "R"), that is, considerations that apply to every rational being regardless of their interests, commitments, inclinations, and desires. But, as the philosopher Simon Blackburn points out, not even mathematical or logical truths have this kind of mandatory force if the person to whom they are addressed refuses to accept certain ground rules. Blackburn reminds his reader of an experience that almost everyone who has taken an introductory logic course has had. Invariably there is one wiseacre student who demands to know why he should accept the principle of non-contradiction. "If I believe X and not-X at the same time, what's wrong with that?" Our response to this demand can take a variety of forms:

1. We can prove to the annoying character that he is thinking contrary to reason.
2. We can prove to our own satisfaction that the position of the annoying character is contrary to reason.
3. We can show that if the annoying character thinks without being constrained by our principles, his thinking will be defective in some respect.
4. All we can hope to show is people do not actually think like that.¹⁹

We have already assumed that #1 is impossible—the annoying character refuses to accept the proof he is offered. So, what is there to do? The only response seems to be to rely on one of the three following styles of argument. We may not be able to make the annoying character internalize our reasons, but we can prove to our satisfaction either that his refusal to accept the ground rules of formal logic is contrary to reason or defective in some respect. As a fallback, we can rely on the empirical point number four, which is that no one actually thinks like that, except when they are trying to be annoying.

The responses to the annoying character in a logic course apply, *mutatis mutandis*, to an annoying character in an ethics course who refuses to accept an argument that is almost as compelling as the principle of non-contradiction, such as an argument that holding slaves is a great moral evil. Some students are fond of playing devil's advocate and demanding to know what reason you could give him that could compel him

19. *Id.* at 215.

to give up his belief that slaveholding is justified by scripture or by bogus biology. Maybe this person is so committed to his devil's advocate stance that he will not make any reason his own, and will continue to claim that he does not accept any of the arguments that have been advanced no matter how compelling they appear to be. Blackburn's point is that it may be enough to prove *about* that person that he is wrong, regardless of whether he assents to that argument. Kant wants reason to be so compelling that it will, by itself, "drum him [our annoying character] into the ranks of the virtuous."²⁰ We may not be able to do that, but we generally do not have to, because most people who take the annoying character or devil's advocate point of view in class simply resume their ordinary practices of ethical reasoning and evaluation when they are no longer being forced to supply a justification for their arguments. To put it another way, I doubt very seriously whether anyone gets by without actually *using* ethical reasoning in their practical deliberations, regardless of what they *say* about ethics. Our hypothetical annoying character would probably be the first to call his roommate a jerk for drinking the last beer in the fridge.

More seriously, some postmodern critics of secular liberal ethics (the values that are probably conveyed in most law school classrooms) demand to know how any ethical argument can respond to a fanatic who is unwilling to give any weight to the claims of justice asserted by those regarded as enemies. This challenge obviously takes on additional force in the wake of the September 11th terrorist attacks, which were motivated by almost incomprehensible zealous devotion to a cause, with both religious and secular underpinnings. The response is a modest one: Ethics "works" only among people who are committed to using language and reason as an alternative to violence in settling disputes. It simply cannot reach someone who believes that violence in the service of a higher cause is preferable to peace. Consider the chilling words of Mamoud, one of the Palestinian cruise-ship hijackers in John Adams's opera *The Death of Klinghoffer*:

That day that I
And my enemy
Sit peacefully
Each putting his case
And working towards peace
That day our hope dies . . .²¹

20. *Id.* at 214.

21. JOHN ADAMS (Music) & ALICE GOODMAN (Libretto), *THE DEATH OF KLINGHOFFER* 110 (Elektra Nonesuch Records 1992) (Mamoud is responding to the *Achille Lauro*'s captain's suggestion that there might be peace if everyone could hear his horrifying story of growing up in refugee

Postmodernists, like Stanley Fish, demand to know how the language of ethics can speak to Mamoud non-coercively—that is, without first declaring by fiat that certain kinds of values, arguments, principles, ideals, and commitments are not to be considered as part of ethical discourse.²² Fish tends to put this argument relatively mildly at times, and at other times tends to make it sound like a radical critique of the possibility of truth in ethics. In his less radical mode, he says things like:

if you are engaged in some purposive activity in the course of which speech happens to be produced, sooner or later you will come to a point when you decide that some forms of speech do not further but endanger that purpose.²³

In other words, if Mamoud is unwilling to listen to the claim of justice of Israelis or Americans, then there is not much point in having a conversation with him about justice. The viability of ethics depends on a commitment to resolving disputes peacefully; without this shared commitment, the whole project never gets started. Thus, ethical language is limited to utterances that meet certain formal and substantive criteria, such as generality, consistency, reference to human concerns and interests, adoption of an other-regarding point of view, and so on. Other kinds of utterances—such as proclamations of single-minded devotion to a cause and indifference to the suffering of others that may be necessitated in furtherance of that cause—are indeed excluded from the language-game of ethics.

Fish takes this argument too far, however, when he tries to use it to support a Foucauldian claim that truth is simply relative to power:

[D]ecisions about what is and is not protected in the realm of expression will rest not on principle or firm doctrine but on the ability of some persons to interpret—recharacterize or rewrite—principle and doctrine in ways that lead to the protection of speech they want heard and . . . the regulation of speech they

camps).

22. See STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO* 107 (1994); see also JOHN RAWLS, *POLITICAL LIBERALISM* xxxix (Paperback ed. 1996). Rawls puts the question in similar terms: "How is it possible for those affirming a religious doctrine that is based on religious authority, for example, the Church or the Bible, also to hold a reasonable political conception that supports a just democratic regime?" *Id.* Rawls is talking about political justice, but Mamoud's challenge is equally acute for a conception of ethics that is fundamentally procedural—that is, which locates objectivity in the nature and logical structure of an ethical conversation.

23. FISH, *THERE'S NO SUCH THING*, *supra* note 22, at 107.

want silenced.²⁴

The target of this passage is liberal free-speech law, but the same kind of argument can be made about ethics, and indeed Fish makes it in other places.²⁵ He suggests that people engage in ethical arguments only where their opponents do not have a powerful argument in response. Where someone's position becomes too threatening, people in power suppress it. Fish would say we are all acting like Mamoud, and would rather resort to coercive force than to sit down peacefully with our enemies.

This is a provocative argument, but does it accurately characterize the discourse of ethics as it actually occurs in the world? This is an empirical argument, but I venture that no one actually lives his or her life as if ethical reasons were true only for the person believing them, and not for anyone else. One simply could not get by in society without being able to participate in an *interpersonal* discourse of praising and blaming others and deciding for oneself how to act. As a matter of logic, Robert Nozick is probably right, that it is hard to refute the relativist position. He imagines an absolutist and a relativist having the following conversation:

Absolutist: There is an absolute truth [about matters of ethics, say, that genocide is evil].

Relativist: That may be true for you, but not for me.

Absolutist: There is an absolute truth, and it is true for everyone.

Relativist: That may be true for you, but not for my [social, linguistic, racial, cultural] group.

24. *Id.* at 110.

25. For example, he suggests that moral arguments cease once the participants in a conversation become convinced that their opponents are wrong:

If you think of hate speech as evidence of moral or cognitive confusion, you will try to clean the confusion up by the application of good reasons; but if you think that hate speakers, rather than being confused, are simply wrong—they reason well enough but their reasons are anchored in beliefs . . . you abhor—you will not place your faith in argument but look for something stronger.

STANLEY FISH, *THE TROUBLE WITH PRINCIPLE* 71 (1999). This itself is a confusing passage, because it seeks to oppose being confused about reasons (in which case others will continue to reason with you) and being wrong about reasons (in which case others will try to suppress your beliefs). The line between believing one's opponent is confused and wrong is not so clear, however. Much ethical discourse depends on the assumption that one's listener or reader is wrong *because* he is confused. The confusion can be the result of sloppy logic, failure to appreciate the weight of some countervailing value, failure to see that a different kind of value is implicated in the situation, and so on. The only people that are excluded from conversations about ethics are those who refuse to play by the ground rules—rules which require reasons to be met by reasons, not force.

Absolutist: There is an absolute truth, and it is truth for *everyone*.

Relativist: That may be true for you, but not for me.

Absolutist: [My interpolation.] Aargggh!²⁶

By denying at every turn that the absolutist's claim is true for him, the relativist is not committing a *logical* error. He is not doing something that is a violation of Reason, with a capital "R." He is just being annoying or, more dangerously, talking like Mahmoud, who prefers murdering his enemies to a peaceful settlement of disputes.²⁷

We cannot refute the steadfast relativist with logic. The best we can do is to show that most people, most of the time, care very much that the reasons they put forward in ethical argument are reasons that others might share. Similarly, they are prepared to be moved by reasons where they are persuasive. Nothing forces us to have this set of motivations, but as sociable and disputatious creatures who have to find a way to live together in a stable, relatively harmonious environment, we naturally turn to the discourse of ethics. Fish's postmodern challenge belongs to the same species of argument as Nozick's demonstration of the logical impossibility of refuting the relativist—it is in principle worrisome, but in practical terms a tempest in a teapot.

I think the same can be said for student skepticism about ethics. It would surprise me very much if they did not leave the classroom and engage in some kind of ethical argument within the hour. Perhaps they are reacting to a story on CNN, rehashing a "policy" argument from another class, criticizing one of their professors for being a jerk, or simply gossiping about an acquaintance. Whether or not these are earth-shaking issues, they are quintessentially normative practices, and the pervasiveness of this kind of discourse provides abundant resources for ethics teachers to work with. The attitude of radical skepticism or relativism seems to be just that—an attitude, or a pose. This is not to deny that there are sophisticated forms of moral relativism that give philosophers headaches,²⁸ but these are generally not the positions put forward in profes-

26. ROBERT NOZICK, INVARIANCES: THE STRUCTURE OF THE OBJECTIVE WORLD 20 (2000).

27. As Nozick recognizes, his argument by itself does not show that relativism is true, "only that it is infuriating." *Id.* at 21. Apparently, these sorts of conversations actually occur, and are predictably infuriating. Blackburn describes a conference a friend of his attended where representatives of various religions explained that their religion offered the path to enlightenment, salvation, release, or whatever. After each presentation, the other panelists murmured something to the effect of, "Wow, terrific, if that works for you that's great," until a Catholic priest exploded in fury: "No!" he said, "it's not a question of if it works for me! It's the true word of the living God, and if you don't believe it you're all damned to hell!" To which the panelists replied—you guessed it—"Wow, terrific, if that works for you that's great." SIMON BLACKBURN, BEING GOOD: AN INTRODUCTION TO ETHICS 26 (2001).

28. See, e.g., GILBERT HARMAN & JUDITH JARVIS THOMSON, MORAL RELATIVISM AND

sional ethics courses. In short, any perceived gap between students' and professors' receptiveness to ethical reasoning can be bridged, simply by recognizing the ordinariness of the whole enterprise.